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Issue Date: 16 May 2006

CASE NO. 2005-LHC-00878

OWCP NO. 14-132810

In the Matter of

JOSHUA MENDOZA,
Claimant,
v.

MARCO SHIPYARDS,
Employer.[1]

Appearances:

Nicole Hanousek, attorney at law, and William Hochberg, Esq.,[2]
for the Claimant.
Russell Metz, Esq.,
for the Employer and Carrier.

BEFORE: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. § 901 *et seq*. Claimant Joshua Mendoza ("Claimant") seeks compensation and medical benefits for a right shoulder injury sustained in the course and scope of his employment as a welder for Marco Shipyards ("Employer") in Seattle, Washington.

PROCEDURAL HISTORY

Claimant filed an LS-18 form with the Office of Worker's Compensation Programs ("OWCP") on December 28, 2004. On January 20, 2005, the case was transmitted to the Office of Administrative Law Judges ("OALJ") for formal hearing. On April 27, 2005, I issued a notice that this case would be called for calendar call on September 12, 2005 in Seattle, Washington.

[1] Employer is uninsured. The original insurance carrier, Reliance, is now in liquidation. TR at 19.

[2] Claimant was represented at the hearing by Nicole Hanousek. However, on January 13, 2005, Claimant submitted a notice that William Hochberg had been substituted for Nicole Hanousek as Claimant's counsel.

On May 2, 2005, I issued an amended notice of calendar call and pretrial order (ALJX 3).

On May 2, 2005, Employer submitted a notice that Russell Williams had withdrawn as Employer's counsel and Russell Metz had been substituted in as Employer's counsel in this case. Also on that date, Mr. Metz submitted a letter stating that he would not be available for the calendar call on September 12, 2005, due to long-standing vacation plans. On May 18, 2005, I issued a notice rescheduling the calendar call for October 31, 2005.

On September 30, 2005, Claimant filed his pretrial statement, witness list, and exhibit list. Also on September 30, 2005, Employer filed its pretrial statement, witness list, and exhibit list (ALJX 2). On October 12, 2005, Claimant filed an amended pretrial statement, witness list, and exhibit list (ALJX 3). On October 14, 2005, Employer filed an amendment to its exhibit list.

A hearing was held on October 31, 2005 in Seattle, Washington. All parties were represented by counsel. Claimant's exhibits ("CX") 1-10 were admitted. TR at 21. Employer's exhibits ("EX") 1- 7 were admitted. TR at 22. Claimant's and Employer's pretrial statements were admitted as Administrative Law Judge exhibits ("ALJX") 1 and 2, respectively. TR at 22-23. The amended notice of calendar call and pretrial order that I issued on May 2, 2005 was admitted as ALJX 3. TR at 107.

Employer objected to the admission of CX 11, reports from Claimant's vocational expert, on the grounds that they were submitted less than 30 days before the hearing, in violation of the pretrial order. TR at 10. There was extensive discussion on the record about the admissibility of this exhibit and how to redress any potential prejudice. TR at 10-17, 53-58, 83-99, 118-121. I ultimately ruled that CX 11 should be admitted, except for the last six pages, which were dated October 28, 2005. TR at 85-86. To resolve any potential prejudice, I ruled that Employer would have until December 16, 2005 to submit a supplemental report from its vocational expert responding to the opinions of Claimant's vocational expert in CX 11 and in her trial testimony. TR at 83, 96-99. It was then agreed that the testimony of Employer's vocational expert would be submitted by perpetuation deposition approximately a month after the submission of her supplemental report. TR at 97-99, 119-121. Accordingly, on February 1, 2006, Employer filed a supplemental report from its vocational expert and a transcript of the deposition of its vocational expert, which became part of the record as EX 8 and EX 9, respectively.

At the close of the hearing, the record was left open for the submission of post-trial briefs, which were filed by Employer and Claimant, and became part of the record on February 3, 2006 as ALJX 4 and 5, respectively. TR at 23, 121.

On April 17, 2006, the record closed when Claimant submitted five pages that had been mistakenly omitted from its trial exhibits, which were admitted as pages 34-38 of EX 6.

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STIPULATIONS

At the hearing (TR at 23-26, 34-36), the parties stipulated to the following:

1. Claimant sustained an injury to his right shoulder on March 28, 2000.
2. Disability commenced on March 28, 2000.
3. Claimant was aware on March 28, 2000 that the disability was work-related.
4. Employer had notice of the injury on March 29, 2000.
5. The Longshore Act applies.
6. At the time of the injury, an employer-employee relationship existed between Claimant and Employer.
7. The injury arose out of and in the course of Claimant's employment.
8. The claim was timely noticed and timely filed.
9. Claimant reached maximum medical improvement on December 6, 2001.
10. Claimant was not working at the time of hearing.
11. This is an unscheduled claim.
12. Claimant's average weekly wage should be calculated under section 10(c) of the Act.
13. This claim does not involve Special Fund relief.
14. Claimant cannot return to his work as a welder for Employer or any other employer.
15. Claimant's temporary disability status for all periods from the time of injury until December 5 2001 changed and became permanent on December 6, 2001 and continues. (TR at 25-26)
16. The medical care Claimant received was reasonable and necessary. (TR at 35-36)

I approve and accept the foregoing stipulations because they are supported by substantial evidence in the record. TR at 23-27, 33-35, 39-40, 44, 68; CX 1; CX 3; CX 5 at 60-62; CX 8 at 128; CX 11A; EX 2 EX 4 at 6.

ISSUES FOR RESOLUTION

1. Extent of Claimant's disability
2. Claimant's average weekly wage
3. Whether there are any outstanding medical bills

ALJX 4 at 3; ALJX 5 at 4.

FINDINGS OF FACT

Claimant was born on April 12, 1944 in the Philippines. TR at 32. He graduated from high school at age 16. TR at 32-33. After high school, he attended a trade school where he learned machinist work and drill press operation. CX 11A at 3. He immigrated to the United States in 1968, moving first to Guam. TR at 32; CX 11A at 3. He then moved to California in 1980 and to Washington state in 1996 or 1997. CX 11A at 3.

Claimant's work history consists almost exclusively of welding, with the exception of some carpentry and masonry work when he lived in Guam. CX 11A at 3. Claimant worked as a welder for various employers in the United States. He testified that he earned about $35,000 in 1986 working as a welder in Long Beach, California. TR at 45-46.

Claimant began working as a welder for Employer Marco Shipyards in March 1997. TR at 33. Claimant's tasks as a welder were generally to weld together metal components as specified by blueprints, procedures, or instructions. EX 6 at 26. His position involved lifting a welding machine with one arm, while climbing around the boat and holding on with the other hand. CX 11A at 3. It also involved working in awkward positions. CX 11A at 4. Claimant's position required the ability to lift up to 60 pounds occasionally and 10 pounds continuously, as well as frequent climbing and frequent to continuous use of both arms. EX 6 at 26.

Claimant testified that he was laid off by Employer at various points, including periods during 1999 and 2000, due to lack of work. TR at 39-40. Consequently, his hours worked and his income varied from year to year. TR at 39, 45.

Claimant testified that he was making about $17 per hour before the accident. TR at 38. Claimant testified that he thought he had earned about $24,000 in the 52 weeks before his injury. TR at 45. Claimant testified that in the years prior to his injury, he had earned $21,000 in one year, $24,000 in another year, and less in other years. TR at 45.

Claimant submitted earnings records from the Social Security Administration showing that he was paid the following amounts: $1,537.52 in 1996 by Pacific Fishermen Inc.; $9,847.50 in 1996 by Westec Industries, Inc.; $1,160.00 in 1997 by Fishing Vessel Owners Marine Ways Inc.; $23,308.38 in 1997 by Employer; $26,801.46 in 1998 by Employer; $21,108.63 in 1999 by Employer; $11,101.44 in 2000 by Employer; $15,541.92 in 2001 by Employer; $24,659.06 in 2002 by Employer. CX 3 at 5-6.

In May 1999, Claimant sought treatment for work-related injuries to his left knee and right elbow, and was diagnosed with patellofemoral arthritis and lateral epicondylitis. CX 5 at 102-03. Between May and July 1999, he was treated with medication, cortisone injections, and physical therapy. CX 5 at 99-101. He was given work restrictions and had to be off work for a period of time when no light duty work was available. CX 5 at 101. Claimant was released to regular duty as of July 26, 1999. Claimant stated that he still has some residual pain from these injuries, but nothing that limits what he is able to do. EX 6 at 25.

On March 28, 2000, Claimant sustained the injury that is the subject of this case. He was lying on his back, reaching into a tight spot in the pilot house of a boat with a stinger when he felt a sharp pain in his right shoulder. TR at 34-35; CX 1 at 2. He continued to work that day. TR at 35. He reported the injury to his supervisor, John Anderson on the next day, March 29, 2000. CX 1 at 2. Claimant continued to work for Employer until May 3, 2000. CX 3.

Claimant was evaluated by Dr. Richard Semon on April 10, 2000 for right shoulder pain. CX 5 at 93, 98. He complained of increasing discomfort when lifting and doing overhead activity, weakness, night pain, but no stiffness or numbness. CX 5 at 93, 98. Dr. Semon found

slight decreased internal and external rotation, positive impingement findings, and somewhat uncomfortable crossed body abduction. CX 5 at 93, 98. Shoulder x-rays were within normal limits, with a little irregularity to the AC joint and an enlarged distal clavicle. Dr. Semon diagnosed impingement syndrome in the right shoulder and adhesive capsulitis. CX 5 at 93, 95, 98. He recommended anti-inflammatory medications, capsular stretching, and modification of activity with regard to the right extremity. CX 5 at 93, 98.

On April 20, 2000, Dr. Clay Wertheimer, a medical doctor at the Everett Orthopedic Surgery Center, evaluated Claimant for complaints of right shoulder pain. CX 5 at 60. On April 26, 2000, Dr. Wertheimer, as Claimant's treating physician, diagnosed rotator cuff tendonitis and possible rotator cuff tear based on objective findings of decreased range of motion and positive impingement signs. CX 5 at 94.

Claimant was evaluated by Dr. Wertheimer again on May 1, 2000 and May 4, 2000. CX 5 at 88, 90, 91. Dr. Wertheimer prescribed physical therapy twice a week for three weeks, and recommended an arthrogram if Claimant's symptoms persisted. CX 5 at 91-92.

Dr. Wertheimer directed Claimant to be off work for at least three weeks. CX 5 at 91-92. Consequently, Claimant was temporarily totally disabled from May 4, 2000 to July 4, 2000, and received $226.01 per week in compensation from Employer. CX 2 at 3a; EX 2 at 2.

On May 25, 2000, Dr. Wertheimer again evaluated Claimant for right shoulder pain and found positive impingement signs. CX 5 at 87, 89. He scheduled an arthrogram of Claimant's right shoulder, which was performed on June 9, 2000. CX 5 at 89; CX 4 at 59. The impression was a small, full-thickness tear involving the distal supraspinatus tendon. CX 4 at 59.

On June 12, 2000, Dr. Wertheimer was advised that Employer had a light-duty, office-work position available for Claimant and it was seeking Dr. Wertheimer's opinions, based on the arthrogram results, about Claimant's ability to work. CX 5 at 86.

On June 15, 2000, Dr. Wertheimer diagnosed a supraspinatus tendon tear in the right shoulder, based on the results of the June 9 arthrogram. CX 5 at 87. He prescribed physical therapy twice a week for two to three weeks. CX 5 at 85. He released Claimant to work as tolerated starting July 5, 2000. CX 5 at 85.

Claimant worked for Employer from July 5, 2000 to August 23, 2000. CX 3. Claimant's light duty work for Employer, during this period and later periods, included conducting safety inspections and maintenance/repair on welding machines and leads. CX 11A at 4; EX 6 at 26. He was also able to do some light, bench welding jobs. EX 6 at 26. The light duty work did not require any lifting of more than 30 pounds or any reaching overhead. EX 6 at 26. Claimant continued to work full time and earn regular, scale wages while on light duty. EX 6 at 26.

When Employer did not have work available, Claimant was laid off and was temporarily totally disabled from August 24, 2000 to May 30, 2001. He received $226.01 per week in compensation from Employer during that time. CX 2 at 3a; EX 2 at 2.

On August 29, 2000, Dr. Wertheimer evaluated Claimant for the first time for left shoulder pain and restricted range of motion, and some painful, restricted range of motion in the cervical spine. CX 5 at 82. He noted that Claimant "spontaneously started having severe pain in his left shoulder blade associated with work in the shipyard. He has been compensating for his sore right shoulder using his left shoulder more and more." CX 5 at 82. Dr. Wertheimer opined that these conditions were related to Claimant's work injury. CX 5 at 82. He directed Claimant to remain off work for three weeks. CX 5 at 83.

On September 19, 2000, Claimant followed up with Dr. Wertheimer regarding his left shoulder and cervical spine pain. Dr. Wertheimer found that "the left shoulder pain is probably muscular, and the neck pain and muscle pain are due to overuse and overcompensation due to his arthrogram-documented rotator cuff tear on the right shoulder." CX 5 at 80. He recommended that Claimant continue physical therapy and consider rotator cuff repair surgery. CX 5 at 80.

On September 22, 2000, Dr. Wertheimer diagnosed a cervical-thoracic sprain and prescribed physical therapy twice a week for two to three weeks to increase Claimant's range of motion and decrease his pain. CX 5 at 81.

Claimant's shoulder pain continued despite physical therapy, and he underwent an open acromioplasty and rotator cuff repair surgery to his right shoulder on October 25, 2000. CX 5 at 76. The operative findings were adhesive capsulitis, and a thickened subacromial bursa that was adhered to the rotator cuff, as well as an impinging acromion and chafing and damage of the supraspinatus with a partial undersurface tear of the supraspinatus. CX 5 at 60, 76.

On November 2, 2000, Dr. Wertheimer removed Claimant's sutures and found that he was making satisfactory progress after his surgery. CX 5 at 80. On November 30, 2000, Dr. Wertheimer again evaluated Claimant's progress after his surgery. He opined that Claimant should continue with physical therapy to increase his range of motion. CX 5 at 75. He opined that Claimant was not ready to return to work yet, but should be released to light-duty work in six to eight weeks. CX 5 at 74.

On January 4, 2001 and on February 26, 2001, Dr. Wertheimer prescribed more physical therapy twice a week for three to four weeks to further Claimant's increased range of motion, and recommended that he participate in a strengthening program. Dr. Wertheimer directed Claimant to remain off work. CX 5 at 69, 71, 74.

Dr. Wertheimer released Claimant, as of March 5, 2001, to work six hours per day, five days a week for eight weeks with restrictions of no lifting, pushing, pulling, or carrying more than ten pounds with his right arm, and no use of his right hand at or above shoulder level. CX 5 at 69-70. On April 16, 2001, Dr. Wertheimer directed that Claimant continue with his light-duty restrictions and continue with physical therapy twice a week for three weeks. CX 5 at 70, 96-97.

A physical capacities evaluation was conducted on May 29, 2001. CX 5 at 68. Claimant's work restrictions were to sit, stand, or walk for up to 4 hours at one time, and to lift or carry up to 10 pounds frequently and 10-50 pounds occasionally. CX 5 at 68.

Claimant worked for Employer from May 31, 2001 to August 9, 2002 performing light-duty work. CX 3.

Between July 26, 2001 and September 24, 2001, Claimant participated in a work conditioning program at Healthsouth. CX 8 at 126; EX 4 at 4.

On September 10, 2001, Dr. Wertheimer found that Claimant was "progressing slowly" and should continue the work conditioning program for six more weeks. He stated, "I anticipate release to full duty without restrictions at that time." CX 5 at 66.

On September 24, 2001, Claimant was discharged from the work conditioning program. CX 8 at 126; EX 4. He was found to be able to lift 30 pounds occasionally in most positions, except that he could lift 50 pounds in the 24" to 36" lift. However, he could only lift 25 pounds frequently. In addition, it was found that he could carry for 50 feet 30 pounds on an occasional basis and only 25 pounds on a frequent basis. CX 8 at 126; EX 4 at 4. Claimant had demonstrated the ability to perform stooping, kneeling, crouching, twisting, pushing and pulling on an occasional basis. CX 8 at 127; EX 4 at 5. His abilities to squat, kneel, bend/stoop, crouch, climb stairs, and operate foot controls were all within normal limits. It was found that he could climb ladders on a frequent basis. CX 8 at 127; EX 4 at 5.

His abilities to reach with his right arm, however, especially overhead at shoulder level, and below knee level, were somewhat limited, although it was still found that he could do these activities frequently as opined by the registered occupational therapist and the physical therapist. CX 8 at 126; EX 4 at 4. Similarly, although his ability to perform handling/grasping, perform fine manipulation, and operate hand controls with his right arm was not within normal limits, it was found that he could do these activities on a continuous basis. CX 8 at 126; EX 4 at 4.

The work conditioning program also found that Claimant was able to follow directions, demonstrated good productivity, and worked independently. CX 8 at 127; EX 4 at 5. They also found that he had a consistent, but slow work pace, and was not punctual. CX 8 at 127; EX 4 at 5. It was found that Claimant did not meet the physical demands of his work goal of being able to perform his regular, full-duty work because he continued to have difficulty with "sustained overhead reaching" with his right arm, which would make it difficult for him to lift welding tools overhead. CX 8 at 128; EX 4 at 6. Claimant voiced concerns "about returning to work full duty due to further damaging his shoulder" and felt "that more time is needed to fully heal his shoulder." CX 8 at 128; EX 4 at 6. It was recommended that Claimant remain on light duty eight hours a day, but that he was expected to be released to return to his regular job duties on a gradual basis as opined by the registered occupational therapist and the physical therapist. CX 8 at 128; EX 4 at 6.

On October 4, 2001, Dr. Wertheimer released Claimant to full-time, light-duty work with the same restrictions from May 29, 2001. CX 5 at 65.

On October 22, 2001, Dr. Wertheimer opined that Claimant's "rotator cuff is likely healed, but he has residual impairment from the injury and the surgery. It is possible that he has a persistent rotator cuff tear and his repair has not successfully healed." CX 5 at 63. Dr.

Wertheimer presented Claimant with two options: to pursue further diagnostic evaluation for persistent rotator cuff tear, or to accept his permanent disability, assess what he can occupation-wise, and maintain his restrictions permanently. CX 5 at 63. Claimant was directed to continue working with his current restrictions for three more weeks. CX 5 at 64.

On November 5, 2001, Dr. Wertheimer released Claimant to work with restrictions of no lifting, pushing, pulling, or carrying more than 30 pounds with his right arm, and no use of this right hand at or above shoulder level. CX 5 at 62, 63.

On December 6, 2001, Dr. Wertheimer concluded that Claimant had reached maximum medical improvement and released Claimant from his care. CX 5 at 61. His final diagnoses were right rotator cuff tear related to the work injury and surgery; mild, preexisting osteoarthritis in the right shoulder; and left shoulder impingement, related to the work injury. CX 5 at 61. He noted that Claimant continued to have pain in his right shoulder, as well as his left shoulder and neck, but that he did not want to pursue further surgery or testing. CX 5 at 60. He found that Claimant had a 10% impairment of his right upper extremity and no ratable impairment of his left shoulder. CX 5 at 61. He released Claimant to return to work with the same restrictions from November 5, 2001 of no lifting, pushing, pulling, or carrying more than 30 pounds with his right arm, and no use of this right hand at or above shoulder level. CX 5 at 60-61. He stated that these restrictions were permanent and due to his right shoulder injury. CX 5 at 62.

Claimant testified that since he was discharged from Dr. Wertheimer's care, he has been receiving treatment at the Community Clinic in Lynwood because he cannot afford a doctor. TR at 37-38, 49. He testified that he did not contact Employer to request a change in physicians. TR at 49. He testified that has been paying out-of-pocket for his treatment at the community clinic and medications that he has been prescribed. TR at 37. In particular, he charged a prescription for Naproxen for about $29.00 to his personal credit card. TR at 49-50. He testified that he did not tell the physician or the pharmacy to send the bill to Employer because he believed he did not have any more connection to Employer. TR at 50, 52. He also testified that he has received $2,000 in outstanding bills from his surgery. TR at 52. He testified that his family does not have any private insurance. TR at 44.

In March 2002, Employer's vocational expert, Merrill Cohen conducted her first labor market survey in an attempt to find suitable, alternative employment for Claimant "in the event that he is not able to continue to work in the light duty capacity at Marco Shipyard." EX 6 at 24. She issued a report on April 12, 2002. EX 6. Ms. Cohen provided a job analysis of Claimant's usual work as a welder for Employer, and described the light duty work he had been doing since his injury. EX 6 at 25. In assessing his physical capabilities, she relied on the work restrictions imposed by Dr. Wertheimer at his December 6, 2001 examination that Claimant should not lift, push, pull, or carry more than 30 pounds with his right arm and should not use his right hand at or above his shoulder. EX 6 at 24. She also noted that Claimant's "current symptoms include right shoulder pain that is increased with activity, lifting, or overhead use. He generally uses his left arm more and has noted some pain in his upper back on the left side." EX 6 at 25. She also noted that Claimant had "graduated from the equivalent of high school in the Philippines in 1962," but had no other training or education and had learned welding on the job. EX 6 at 25.

Ms. Cohen also met with Claimant and conducted some vocational testing. EX 6 at 27. However, although Claimant remembered meeting Ms. Cohen, he did not recall any testing. TR at 43, 49. On the SRA Reading Index, Claimant was found to be proficient at level three, meaning that he demonstrated proficiency at picture/word association, word decoding, and phrase comprehension, but did not demonstrate proficiency at sentence comprehension and paragraph comprehension. EX 6 at 27. On the SRA Arithmetic Index, Claimant was found to be proficient at level two, meaning that he demonstrated proficiency at addition and subtraction of whole numbers and multiplication and division of whole numbers, but did not demonstrate proficiency with fractions or decimals and percentages. EX 6 at 27.

Also in her April 12, 2002 report, Ms. Cohen opined that Claimant "retains access to a range of light manufacturing jobs, as well as other relatively entry level, unskilled positions in the local labor market." EX 6 at 27. In particular, she identified ten positions that she believed were consistent with Claimant's physical restrictions, skills, and abilities. These positions, which were available between March 16 and April 10, 2002 and paid between $7.00 and $10.95 per hour, included two security officer positions, an assembler position, a cashier position, a janitor position, two production worker positions, a machine operator position, a security inspector position, and a wheel assembler position. EX 6 at 28.

Claimant testified that he "studied a bunch" of the positions identified by Ms. Cohen, but that he was holding out for a welding job. TR at 47-48. He testified that he has always liked welding and wanted to be a welder. TR at 46-48. He stated, "If they would allow me, I still want to be a welder." TR at 47.

Claimant worked for Employer from December 30, 2002 to January 31, 2003 doing light-duty work. CX 3.

On October 28, 2003, Employer filed a notice of controversion, contending that Claimant had no loss of wage-earning capacity based on its April 2002 labor market survey. CX 2 at 3; EX 1 at 1.

On April 26, 2004, Dr. Kenneth O'Bara opined that Claimant could return to his work with a restriction of no lifting more than 50 pounds, but that Claimant would have trouble with working above his head. CX 7 at 120, 123; EX 3 at 3.

Claimant worked for Employer from April 27, 2004 until June 18, 2004, when he was laid off by Employer due to lack of work. CX 3; TR at 40, 46. Claimant testified that he was earning $18.45 per hour at the time he was laid off. TR at 38. He testified that he has not worked at all since June 2004, and has been relying on his wife's income for support. TR at 44.

On July 27, 2005, Claimant met with Ms. Kathryn Reid, Claimant's vocational expert, for about an hour and a half. Claimant testified that Ms. Reid asked him many questions about his welding background and abilities. TR at 48.

In late August 2005, Ms. Cohen conducted her second labor market survey. She issued a report on October 12, 2005. EX 5. She did not meet with Claimant again in preparing this

survey or report. TR at 43-44. Ms. Cohen noted that, since her April 2002 labor market survey, she had been provided with and had taken into consideration additional medical records from Dr. Wertheimer, Healthforce Occupational Medicine, and vocational records from Concentra Integrated Services. EX 7 at 7a. She identified ten positions that she believed were consistent with Claimant's physical restrictions, skills, and abilities. These positions, which were available between August 11 and September 23, 2005 and paid between $8.00 and $16.00 per hour, included a coil winder position, three security officer positions, a machine operator position, eight assembler positions, an appointment setter position, and an ice cream maker/dishwasher position. EX 5 at 76.

On September 30, 2005, Ms. Reid issued a vocational report. (CX 11) She noted the permanent work restrictions from Dr. Wertheimer's closing report on December 6, 2001. Ms. Reid summarized the job analysis of Claimant's welding job for Employer that had been performed by Loren Forsberg on May 31, 2001. CX 11A at 2. She also summarized the vocational testing that had been performed by Ms. Cohen in April 2002. Ms. Reid also noted that Claimant had received vocational counseling from Susan Hanson from November 26, 2003 to September 11, 2004, and from Brian Sorenson from September 2, 2004 to December 1, 2004. CX 11A at 2-3.

Ms. Reid also summarized a report dated March 12, 2004 regarding vocational testing that had been performed by Concentra. CX 11A at 2. She wrote that

> Academic testing showed post-high school level reading/word recognition (average) and lower spelling and arithmetic scores. The Raven Progressive Matrices indicated abstract reasoning and problem-solving ability in the low average range. The Career Ability Placement Survey indicated aptitudes were average for manual speed/dexterity, low-average for spatial relations and low for mechanical reasoning, verbal reasoning, numerical ability, language usage, word knowledge and perceptual speed/accuracy. These met minimal requirements for categories of work in consumer economics, outdoors, skilled service and skilled technology. The Career Occupational Preference System showed high-average interest in professional technology and consumer economics and average for all other areas. The Career Orientation Placement and Evaluation Survey showed temperaments as conformity, supportive and privacy.
>
> Based on these results, general educational development (GED) levels were reasoning 1, math 2 and language 2, lower than the work history profile of reasoning 4, math 3 and language 2.

Also in her September 30, 2005, Ms. Reid explained that she had only performed interest testing, due to Ms. Cohen's prior vocational testing. CX 11A at 4. The Career Assessment Inventory showed that Claimant had high interest in mechanical/fixing work, electronics, and manual/skilled trades, and he had a preference for working with things more than people and mechanics more than fine arts. CX 11A at 4. She also noted that Claimant is not fluent in English, as it is his second language, but he understands more than he can speak and he spoke sufficient English for interviewing and vocational testing. CX 11A at 3-4. She noted that

Claimant's "work history is almost exclusively in welding." CX 11A at 3. She also wrote that Claimant "feels discouraged as he cannot find a job and has given up." CX 11A at 3. Finally, Ms. Reid opined that Claimant's "competitiveness is very limited in the general labor market" because he has few transferable skills from welding and he "does not have any education or a GED in this country, office or computer skills, or experience working with the public, handling cash, proving customer service or keeping report logs." CX 11A at 4.

Ms. Reid then provided individual critiques of the positions identified in Ms. Cohen's April 2002 labor market survey, and ultimately concluded that none of the positions was suitable for Claimant. CX 11A at 4-7. She found that many of the positions would be unsuitable because they required good communication skills and customer service skills, which Claimant does not have. She found that some of the positions did not fit with Claimant's work restrictions in that they required reaching/lifting overhead or heavy lifting. In addition, she found that many of the positions would likely be unsuitable because, even if the amount of weight to be lifted or carried was technically within Claimant's work restrictions, the job description did not specify how high the weight needed to be lifted or whether the weight was of a size and shape that would allow the weight to be evenly distributed between both arms. She also found that some of the positions required, or strongly preferred, a high school diploma or GED. Ms. Reid also found that some of the positions identified were only temporary. She also found that some of the job descriptions were inadequate, in that it was impossible to determine whether the work was within Claimant's abilities and restrictions. She also found that some of the positions, although they did not explicitly require prior experience, had strong preferences for applicants with relevant experience, such that Claimant would not be competitive. Ms. Reid concluded, "These jobs are currently or usually unavailable, not full-time, too strenuous, and/or require education and/or experience beyond Mr. Mendoza's abilities and qualifications. As he is also nearing retirement age, it is my opinion that he is not competitively employable and therefore totally and permanently disabled." CX 11A at 7.

On October 31, 2005, Ms. Reid testified at the hearing in this case. She again summarized her understanding of Claimant's education, experience, skills/abilities, and work restrictions. TR at 62-69. She again summarized the vocational testing that she had performed and that Ms. Cohen had performed. TR at 63-65. She opined that based on his education, experience, and vocational testing, Claimant could theoretically do "low skill, entry-level positions that don't require a high school diploma or a GED in the United States, that don't require the academic, reading, writing, and arithmetic skills above a very moderate level, that don't require any experience in using computers or working with the public, handling cash, providing customer service, keeping report logs, any of these things that are done in other industries." TR at 65-66. However, she found that Claimant is further limited by his lack of English fluency and inability to easily obtain a GED. TR at 67. He is even further limited by his age and is "likely to be seen as a short-term employee by a new employer." TR at 67. Claimant's work restrictions further limit his competitiveness in that a "large part of the entry-level jobs really are laboring jobs" in which "a younger person or a person without physical restrictions…[can begin by doing] medium or heavy lifting and then gradually learn on the job and progress to a more skilled job." TR at 67. Ms. Reid also noted that the effect of Claimant's work restrictions is increased by his short stature, in that "in manufacturing environments, a lot of the work is at a high level. Mr. Mendoza is not a tall man, so his shoulder level is kind of a

mid-level for a lot of manufacturing processes." TR at 68-69. In conclusion, she opined that Claimant "is not able to really obtain and perform and maintain reasonably continuous gainful employment. He may be able to be hired on a temporary basis….but I don't think he's going to be capable of really working on an ongoing basis. He just isn't qualified." TR at 69. Ms. Reid based this opinion on Claimant's "age, his education, his English as a second language, his limited transferable skills, and the physical restrictions from this industrial injury." TR at 69-70.

Ms. Reid then provided individual critiques of the positions identified in Ms. Cohen's August 2005 labor market survey. As with the April 2002 labor market survey, Ms. Reid found that many of the positions, particularly the security guard positions, required a GED or high school diploma. TR at 77-78, 101. She also found that some of the positions were only temporary, or that Claimant would be terminated after a limited probationary or training period. TR at 77, 80, 81, 112. She stated that "where he's on trial as a temp, I think that he's unlikely then to be kept on and changed to a permanent employee, and that's because of his age and his language skills primarily." TR at 113. She also found that some of the positions required specific skills or experience that Claimant does not have, including reading different types of blueprints. TR at 81,100, 101, 102, 109-110. She also found that Claimant's language skills and accent would prevent him from being competitive in some of the jobs. TR at 102-03. Again, some of the job descriptions were not detailed enough to determine whether Claimant could do the job. TR at 81. One position was somewhat beyond Claimant's geographical area. TR at 81.

On December 12, 2005, Ms. Cohen issued a supplemental report (EX 8 at 42), responding to Ms. Reid's trial testimony and the contents of her September 30 report. First, she responded to some of the general concerns and criticisms raised by Ms. Reid. In particular, she emphasized that Claimant's work restrictions include no lifting more than 30 pounds with the right arm. She argued, "It is reasonable to assume, therefore, that he would be able to lift in the area of 50 lbs. using both arms. He does not have a medical restriction against lifting more than 30 lbs., as this restriction relates only to what he can lift with the one arm." EX 8 at 42. She also reiterated that Claimant's lack of "transferable skills" is irrelevant since "the overwhelming majority of the jobs in [her] labor market survey are entry-level and unskilled positions." EX 8 at 42-43. Ms. Cohen also emphasized that "[w]hether or not [the jobs] are open all the time is immaterial. They were all certainly open and available at the time that they were identified and included in the labor market survey." EX 8 at 43. She also emphasized that, based on her own work experience, "[s]omebody who is qualified to read blueprints for welding and shipbuilding should have no trouble at all learning additional symbols or signs to facilitate the reading and interpretation of blueprints used in other industries." EX 8 at 43. Finally, Ms. Cohen stated that the "general educational development requirements for each of these occupations [in her 2005 labor market survey] are lower than those required for the occupation of gas welder, the job that Mr. Mendoza has performed for the majority of his working years. I would respectfully disagree with Ms. Reid's assessment that Mr. Mendoza has some cognitive deficits that would limit his ability to perform any of the jobs in my labor market survey." EX 8 at 43.

Also in her December 12, 2005 supplemental report, Ms. Cohen provided updated information about some of the individual positions identified in her August 2005 labor market survey. She recontacted the employers to clarify the job descriptions and inquire about the concerns raised by Ms. Reid. EX 8 at 42, 44. As a result of Ms. Reid's concerns and

recontacting the employers, Ms. Cohen eliminated as unsuitable 5 positions from her 2005 labor market survey: the Case Assembler position with Aerotek Commercial, the Bench Assembler position with Express Personnel Services, the Assembler I position with Applied Technical Services, the Sign Assembler position with Alderwood Sign, and the Mechanical Assembler position with Aerotek Commercial. EX 9 at 70. She believed that the remaining jobs continued to be "viable employment options" for Claimant. EX 8 at 42, 44.

Pursuant to my ruling at the hearing, Ms. Cohen was deposed on January 17, 2006. EX 9 at 56. She reiterated much of what she wrote in her December 12, 2005 report, addressing the concerns raised by Ms. Reid and clarifying the job descriptions by recontacting employers. Ms. Cohen emphasized that she believed Claimant would be able to do jobs that require blueprint reading because "he has read blueprints for his entire career. Although there may be some symbols or signs that would vary between industries, somebody who is well skilled in reading blueprints for shipbuilding, welding, and whatnot should have no difficulty adding a few symbols to their repertoire if you will." EX 9 at 65. Based on her own experience working about 16 years ago in the aircraft industry, in shipyards and in electronics firms, she opined that "if you have read blueprints for 25 years in one industry and you are of average or low average intelligence, certainly doing a less skilled job where there are also some blueprints to be read would be something certainly within an individual's ability." EX 9 at 86-87. Ms. Cohen also testified that, in her opinion, Claimant "certainly speaks English well, understands English, and English is actually one of the official languages of the Philippines….and I don't believe that for any of the jobs in my survey, considering the relatively low skill level in all of them, that his English ability is a problem whatsoever." EX 9 at 67. However, she conceded on cross-examination that her opinions about Claimant's language skills are based on meeting him once in 2002 and the "one piece of information" she had about the use of English in the Philippines. EX 9 at 78-79. Ms. Cohen testified that Claimant "was very clear that he did not want to do anything other than welding, and therefore did not apply for any of the jobs that I sent to him, nor did he apply for any other jobs." EX 9 at 67.

In response to questions on cross-examination, Ms. Cohen explained that she directs and approves each labor market survey, but that another staff member, Ron Schmidt, actually calls the prospective employers. EX 9 at 72-75. She also conceded that her labor market surveys include positions that are filled through temporary agencies that hire for either temporary or temporary-to-permanent work. EX 9 at 76. She explained that the positions filled through the temporary agencies are specific positions rather than generic descriptions, but that she does not know the actual job site or the actual employer. EX 9 at 77. Ms. Cohen conceded that she was "not claiming that he got the same level of education [in the Philippines] as he would have had he gotten it here. He got what people typically get in his home country." EX 9 at 79. She also conceded that a security guard position would require communicating with individuals they come into contact with and keeping a log of their activities and any incidents that might occur, and depending on the assignment, could also involve a high level of social contact and being in conflict situations. EX 9 at 89-90. Ms. Cohen disputed that a high school diploma from the U.S. or a GED was required to be a security guard. EX 9 at 91-93.

Ms. Cohen explained that she adjusts wages for inflation "using the charts published by the Department of Labor in terms of how much they increase the comp rate every year" and also

based on what the minimum wage was at that time of injury. EX 9 at 95-97. The jobs in her 2005 labor market survey were paying a range of $8.50 to $16.00 at the time of the survey, which she adjusted to a range of $7.07 to $13.31 at the time of injury. She did not calculate the wages at the time of injury for each job. EX 9 at 104. By way of explaining the wage range, Ms. Cohen stated that "most workers are going to start at the lower end and move up. But the wages for these jobs have a range between them as well as within them." EX 9 at 105-06.

CONCLUSIONS OF LAW

These findings of fact and conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan,* 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

Credibility

Claimant

I found Claimant to be very credible in describing his injury and the pain and limitations that he experiences as a result of his injury. I also found Claimant credible in stating that he wanted nothing else but a position as a welder, and in expressing reservations about his ability to obtain and perform alternative employment. I also found it very difficult to understand Claimant's statements many times during his testimony.

Ms. Reid, Claimant's vocational expert

I did not find Ms. Reid to be entirely credible. Although I ultimately come to the same conclusion that none of the positions identified by Employer constitute suitable alternative employment, I found many of the reasons relied upon by Ms. Reid to be not credible. For example, she was not credible that Claimant did not have any significant transferable skills from his welding work and could not learn to read any other types of blueprints. In addition, she focused on issues, such as whether the positions were being filled by a temporary agency and whether the positions were often available, which are not relevant in a longshore case. Overall, many of Ms. Reid's statements about why the jobs in the Employer's labor market surveys were unsuitable were evasive and confusing at trial.

I did find, however, that Ms. Reid took proper consideration of Claimant's personal

attributes and limitations. For example, I found her credible when she stated that he is unlikely to be able to perform jobs that require him to reach with his right arm, due to his short stature. I also found that she accurately assessed Claimant's language skills. She was also credible about the impact that his age would have on his competitiveness.

Ms. Cohen, Employer's vocational expert

Ms. Cohen testified that she has been retained by both claimants and employers in the longshore setting to perform vocational assessments. EX 9 at 97. She testified that she does "much less work" on federal longshore cases than state workers' compensation cases. EX 9 at 98-99. She estimated that her current caseload of state workers' compensation cases was about a 50/50 split between evaluations at the request of claimants and evaluations at the request of employers and the state workers' compensation department. EX 9 at 98. She testified that she has been retained by Employer's counsel, Mr. Metz, before, but that work for him does not even constitute one percent of her total work. EX 9 at 98.

Based on the transcript of her deposition, I found Ms. Cohen to be generally credible. She testified knowledgeably about vocational testing, employer hiring practices, resources such as the Dictionary of Occupational Titles and the Washington Occupational Information System and Workforce Explorer, and the differences between state and longshore worker's compensation rules. She also spoke about blueprint reading from her own experience working as a fabricator and assembler in the aircraft industry and shipyards. EX 9 at 86-87.

However, I found that Ms. Cohen's analysis of whether certain positions constituted suitable alternative employment was overly artificial. It appears that she focused almost entirely on whether positions fit Claimant's physical restrictions, but neglected to consider whether he would truly be competitive for those positions, based on his actual skills, abilities, education, age, and other factors.

In addition, I did not find Ms. Cohen at all credible with regard to her assessment of Claimant's language skills. She stated that Claimant communicated well, and she identified positions that required good communication skills. However, as discussed in more detail below, I find that Claimant's testimony at the hearing in the case, the vocational testing performed by Ms. Cohen herself, and the opinion of Ms. Reid based on her own conversations and testing all demonstrate that Claimant does not communicate well and has weak English language skills.

Analysis

1. Extent of Claimant's disability

a. Availability of Suitable Alternative Employment

The parties also stipulated, and I find, that Claimant cannot return to his regular work as a welder for Employer or any other employer. TR at 34; Stip. Fact No. 14.

If a claimant has established that with his physical restrictions he cannot return to his regular work, he will be considered permanently totally disabled unless the employer establishes suitable alternative employment. *See EX 5 at 66; Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Employer bears the burden of establishing the existence of realistically available job opportunities within the geographic area in which Claimant resides and which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Hansen v. Container Stevedoring Co.,* 13 BRBS 155, 159 n.5 (1997); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If the employer meets its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Edwards v. Director, OWCP*, 999 F.2d 1374(9th Cir. 1993); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors regarding specific job openings to establish the existence of suitable positions. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985). The counselors must identify specific available positions; labor market surveys are not enough. *See Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local job opportunities. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Thus, since Claimant is unable to return to his former position, Employer has the burden of showing that there are suitable alternative positions available to him. In an effort to show that Claimant can obtain and perform suitable alternative employment with other employers in the Seattle, Washington area, Employer submitted two labor market surveys and a third report by its vocational consultant Ms. Merrill Cohen. In its 2002 labor market survey, Employer identified 10 positions. EX 6. In its 2005 labor market survey (EX 5), Employer identified 15 positions, but in its December 2005 report (EX 8), Employer withdrew as inappropriate 5 of those positions (thus, I am completely ignoring these 5 position in my analysis). Employer asserts that these reports show that there were 10 open positions in or around April 2002 and 10 positions in or around August 2005 that met the restrictions imposed by Dr. Wertheimer, matched Claimant's skills and abilities as measured by the vocational testing results, and also took into consideration Claimant's age, education, and work experience.

I find that Employer has not met its burden of demonstrating the availability of suitable alternative employment. The positions identified by Employer are all inappropriate because Claimant would be unable to obtain and perform the work given his physical restrictions, education, language skills, work experience and abilities, and age.

i. Claimant's physical restrictions

According to Dr. Wertheimer's December 6, 2001 report, Claimant has physical restrictions of no lifting, pushing, pulling, or carrying more than 30 pounds with his right arm, and no use of this right hand at or above shoulder level. CX 5 at 60-61. Employer did not accurately assess and consider these work restrictions.

Ms. Cohen asserted that Claimant's work restrictions are only that he cannot lift more than 30 pounds with his right arm, such that he can lift more than 30 pounds with both arms together. EX 8 at 42; EX 9 at 8. However, she is not a medical doctor and is not qualified to determine physical work restrictions. Moreover, allowing Claimant to lift more than 30 pounds with both arms seems potentially problematic given that Claimant was already developing left shoulder problems as long ago at August 2000, due to use of his left arm to compensate for his right. CX 5 at 80-82. It would not be in the interests of Claimant or Employer for Claimant to do work that required him to overcompensate with his left arm, since such work could result in another related, and therefore potentially compensable, injury.

Ms. Reid also raised a valid concern that whether a weight can be distributed equally between both arms depends upon the size and/or shape of the object to be lifted and carried. TR at 102; CX 11A at 5. Most of the job descriptions do not describe the size and shape of the weights to be lifted and carried. In addition, some of the job descriptions are not clear on whether the lifting can be done with either or both arms.

For all of these reasons, I find that Employer has not met its burden with regard to any position requiring lifting of more than 30 pounds. Thus, the following positions have not been established as suitable for the reasons stated: Security Inspector at Space Needle requires occasional lifting of up to 50 pounds (EX 6 at 29); Production Worker through General Employment requires seldom lifting of up to 50 pounds (EX 6 at 31); Machine Operator at Stell Industries, Inc. requires occasional lifting of 30-40 pounds and may require some lifting overhead and pulling weights of 50 pounds (EX 6 at 32; CX 11 at 6); Production Worker through Terra Personnel Group involves seldom lifting of 30-50 pounds (EX 6 at 33); Janitor for Dependable Building Maintenance Company requires seldom lifting of 40 pounds (EX 6 at 37); Wheel Assembler at Seattle Bike Supply requires lifting 75 pound boxes of metal parts in odd shapes (CX 11A at 5); the Machine Operator/Fabricator position with Renton Coil Spring Company requires lifting that can be limited to lighter items in most cases but occasionally requires lifting up to 50 pounds with other workers. (EX 5 at 22; EX 8 at 55).

In addition to the weight limitation, Claimant also has a work restriction that he cannot reach *at or above* shoulder level with his right arm. CX 5 at 60-61. However, Employer's labor market survey only inquired whether each position required reaching *above* the shoulder, not *at or above* the shoulder. Moreover, Ms. Reid testified credibly that many manufacturing positions require reaching at a relatively high level. TR at 68-69. Due to Claimant's short stature, reaching that would be at a mid-level for most workers could be at or above his shoulder level. There is no evidence that Ms. Cohen provided the prospective employers with information about Claimant's stature when she was inquiring about the job requirements, so I presume that the employer's descriptions of whether the required reaching was above shoulder level were based on a worker of average height. Thus, positions that require reaching at any level are potentially problematic for Claimant because Employer's labor market surveys did not ascertain whether a position required reaching *at* shoulder level and did not properly account for Claimant's short stature. In addition, most of the job descriptions in Employer's labor market surveys did not specify whether the reaching could be done with either arm.

For all of these reasons, I find that that Employer has not met its burden of proving the suitability of any position that involves frequent reaching at any level. Thus, the following positions, which require frequent reaching, have not been established as suitable: the Wheel Assembler position at Seattle Bike Supply (EX 6 at 30); the Production Worker position through General Employment (EX 6 at 31); the Machine Operator position at Stell Industries, Inc. (EX 6 at 32); the Production Worker position through Terra Personnel Group (EX 6 at 33); the Assembler with Lost Luggage (EX 6 at 35); the Production Worker position through Worksource Auburn (EX 5 at 9); the Bench Assembler position at NorMed (EX 5 at 12); the Assembler position through WesTech Technical Staffing (EX 5 at 14); the Assembler position at Macro Technology (EX 5 at 16); the Security Officer position with Securitas (EX 5 at 20); and the Ice Cream Maker/Dishwasher position through Personnel Management Systems (EX 5 at 23).

ii. Claimant's education

Claimant graduated at age 16 from high school in the Philippines. Some of the positions identified by Employer, particularly some of the security guard positions, always require a high school diploma from the U.S. or a GED certificate. These positions, which include the Security Officer position for Puget Sound Security (EX 6 at 34) and the Security Officer/Security Guard for Millennium Protective Services (EX 6 at 38), are clearly unsuitable. Ms. Cohen emphasized that many of the employers who required a high school diploma would accept a diploma from the Philippines as long as the employee could write and speak English effectively, including the Security Officer position with Guardsmark Inc. (EX 5 at 19) and the Security Officer position with Securitas (EX 5 at 20). However, I find that Claimant would not qualify for such positions due to his weak language skills, as discussed below.

iii. Claimant's language skills

The vocational testing that Ms. Cohen performed for her 2002 report demonstrated that Claimant was not proficient in comprehending sentences or paragraphs. EX 6 at 27. In her September 2005 report, Ms. Reid emphasized that Claimant is not fluent in English, as it is his second language, but noted that he spoke sufficient English for the purposes of her vocational testing and interviewing. CX 11A at 3-4. Ms. Reid raised concerns about Claimant's competitiveness for positions requiring good communication skills. CX 11A at 4-5. Then, at the hearing, Claimant himself acknowledged that his ability to obtain and perform alternative employment was limited by his weak communication skills. He testified that he had doubts and concerns about some of the jobs identified by his vocational counselor, in particular a job working as a warehouseman, because "my English not too good, you know, maybe can't understand me." TR at 41. However, at the deposition, Ms. Cohen expressed a much more positive view of Claimant's communication skills. She stated, "He certainly speaks English well, understands English, and English is actually one of the official languages of the Philippines. It's widely used in the Philippines, and I don't believe that for any of the jobs in my survey, considering the relatively low skill level in all of them, that his English ability is a problem whatsoever." EX 9 at 67. Later, on cross-examination, she refused to agree that

English is Claimant's second language, stating "[t]he best I can tell you is that English is widely used in the Philippines[.]"

I find that Ms. Cohen's statements about Claimant's communication skills are not credible. Her opinion of Claimant's language skills was based primarily on meeting and interviewing him once back in 2002. Whether English is an official language of the Philippines is of little relevance to the issue of whether Claimant speaks and understands English well enough to obtain and perform and of the positions she has identified. Moreover, Ms. Cohen's opinion is not supported by her own vocational testing, which revealed that Claimant was not proficient at reading sentences or paragraphs. Thus, I reject Ms. Cohen's opinions about the level of Claimant's communication skills and their effect on his competitiveness for the positions identified.

In addition to considering the vocational testing results and the opinions of the vocational experts, I also had the opportunity to observe Claimant's communication skills first-hand at the hearing. I listened to Claimant's testimony on direct and cross-examination and questioned him myself. I found that there were numerous instances in which Claimant did not understand the questions being asked and/or his responses were confusing or unintelligible. Thus, based on the vocational testing results, the opinions of Ms. Reid, and my own observation of Claimant, I find that he has weak communication skills that would significantly limit his competitiveness for all of the positions identified by Employer, particularly those requiring good communication skills.

Thus, as a general category, I find that Claimant would be unable to realistically compete for, obtain, or perform any of the security guard positions due to his weak language skills. A security guard must keep logs and write incident reports, as well as interact with and confront people, all of which requires solid written and oral communication skills. Also, most of the job descriptions for the security guard positions explicitly require that the employee be able to "follow written and oral instructions without close supervision," which Claimant is not clearly able to do, based on his limited language skills. Positions with these stated requirements include the Security Officer position for Puget Sound Security (EX 6 at 34); the Security Guard/Security Officer positions with Millennium Protective Services (EX 6 at 38); the Security Officer position for Northwest Protective Service (EX 5 at 10); the Security Officer position for Guardsmark Inc. (EX 5 at 19); and the Security Officer position for Securitas (EX 5 at 20). In addition, one of the positions, the Security Officer position with Northwest Protective Service, Inc., requires candidates to pass an English reading test and provide adequate oral answers to questions during the interview. EX 8 at 54. Thus, none of these positions constitute suitable alternative employment for Claimant due to his weak language skills.

Many of the other job descriptions explicitly state that the employee "must be…able to communicate well" or "must have good communications skills." Positions with these stated requirements include Security Inspector at Space Needle (EX 6 at 29); Wheel Assembler at Seattle Bike Supply (EX 6 at 30); Production Worker at General Employment (EX 6 at 31); Production Worker at Terra Personnel Group (EX 6 at 33); Assembler with Lost Luggage (EX 6 at 35); Assembler through WesTech Technical Staffing (EX 5 at 14); and Appointment Setter with Evans Glass (EX 5 at 18). I find that none of these positions constitute suitable alternative employment for Claimant due to his weak language skills.

Many other job descriptions explicitly state that the employee must be able to "follow instructions carefully" or "pay strict attention to standards and guidelines." I note that being able to understand and follow instructions is usually a lesser ability that being able to communicate well. I also note that Claimant has stated that he understands English better than he can speak or write it, and his long work history suggests that he has been able to follow instructions and standards/guidelines at least within the context of welding. Nevertheless, I find that Claimant would not be competitive for positions with these requirements. His vocational testing results revealed that he is not proficient at comprehending sentences or paragraphs. Moreover, I find that an employer who was exposed to his weak communication skills through reviewing his application or interviewing him would likely have doubts about his ability to follow instructions or standards/guidelines, such that he would not be competitive. Positions with these stated requirements include the following positions Wheel Assembler at Seattle Bike Supply (EX 6 at 30); Production Worker at General Employment (EX 6 at 31); Production Worker at Terra Personnel Group (EX 6 at 33); Assembler with Lost Luggage (EX 6 at 35); Coil Winder for NDT Engineering (EX 5 at 8); Production Worker through Worksource Auburn (EX 5 at 9); Bench Assembler for NorMed (EX 5 at 12); Assembler through WesTech Technical Staffing (EX 5 at 14); Assembler for Macro Technology (EX 5 at 16); Ice Cream Maker/Dishwasher through Personnel Management Systems (EX 5 at 23). Thus, I find that none of these positions constitutes suitable alternative employment due to Claimant's weak language skills.

In addition, the Janitor position with Dependable Building Maintenance Company (EX 6 at 37) requires that the employee be able to "follow basic instructions" and have "sufficient English skills to understand instructions and read labels." Some other positions also specifically require basic reading skills, including Bench Assembler at Nor Med (EX 5 at 12); and Machine Operator/Fabricator at Renton Coil Spring Company (EX 5 at 22). I find that none of these positions constitutes suitable alternative employment due to Claimant's weak language skills.

iv. Claimant's experience and skills/abilities

Claimant worked almost exclusively as a welder from age 16 until June 2004 when he was laid off by Employer. As a result, he has few transferable skills to careers outside of welding. Claimant himself expressed doubts and concerns about his ability to obtain and perform work other than welding. He testified that he was "scared a little" of some of the jobs identified by his vocational counselor, including positions as a security guard and a truck driver. TR at 41.

First, some of the positions identified by Employer require experience or skills that Claimant does not have at all. For example, the Coil Winder position at NDT Engineering requires "skill with handtools." EX 5 at 8. The Cashier position at Price Brothers 76 requires the ability to "make change correctly; operate a cash register." EX 6 at 36. The Janitor position with Dependable Building Maintenance Company requires the "[a]bility to use cleaning tools and equipment." EX 6 at 36. In addition, a few of the positions require *strong* customer service and interpersonal skills, including the Security Inspector position at the Space Needle (EX 6 at 29); the Cashier position with Price Brothers 76 (EX 6 at 36); and the Appointment Setter with

Evans Glass (EX 5 at 18). Although some of these skills probably could be learned quickly, they are skills and abilities that Claimant does not currently possess and therefore, he would not be competitive for these positions. Moreover, I find that an employer is unlikely to be willing to train Claimant in these skills, especially given his age and language limitations.

Second, some of the positions require skills or abilities that one would think Claimant would possess based on his welding experience, but which are not supported by his vocational testing results. For example, many of the positions require "good manual dexterity," including the Coil Winder position at NDT Engineering (EX 5 at 8); the Bench Assembler position at Nor Med (EX 5 at 12); the Assembler position at Macro Technology (EX 5 at 16); the Wheel Assembler position at Seattle Bike Supply (EX 6 at 30); the Production Worker position through General Employment (EX 6 at 31); and the Production Worker position through Terra Personnel Group (EX 6 at 33). Similarly, the Assembler position through WesTech Technical Staffing (EX 5 at 14) and the Assembler position at Lost Luggage (EX 6 at 35) both require "manual dexterity." However, according to the Career Ability Placement Survey conducted by Concentra, Claimant's manual dexterity is only average. CX 11A at 2. Therefore, I find that, even in the unlikely event that he was hired for one of these positions, Claimant would likely not be retained after it became evident that he did not possess the manual dexterity to be productive.

Similarly, although most of the positions requiring a high level of mechanical aptitude or specific skills/experience were eliminated by Ms. Cohen in preparing her December 2005 report (EX 9), at least one of the remaining positions requires "mechanical aptitude." The Machine Operator/Fabricator position with Renton Coil Spring Company requires "mechanical aptitude." EX 5 at 22. Ms. Reid testified that this employer gives candidates an aptitude test. TR at 79. Claimant has low mechanical reasoning ability, according to the Career Ability Placement Survey conducted by Concentra. CX 11A at 2. Thus, it is unlikely that Claimant would pass the mechanical aptitude test to be hired for this position.

Some of the positions also require or prefer workers with an ability to read blueprints/schematics: the Wheel Assembler position at Seattle Bike Supply (EX 6 at 30) and the Machine Operator/Fabricator position with Renton Coil Spring Company (TR at 79). There was much debate between the vocational experts about whether Claimant's experience reading blueprints in his welding work would be transferable to these other positions. I find that Claimant should have some transferable skills in reading blueprints, which might make him slightly more competitive for those positions that he would be otherwise, but the positions are still unsuitable for all of the other reasons discussed in this section.

Finally, I note that some of the positions are temporary-to-permanent, based on performance and productivity. For example, the Bench Assembler position at NorMed tests candidates for their assembly and packaging skills before hiring them, and also, workers who do not meet productivity goals are not retained. EX 8 at 47. Also, the Assembler position through WesTech Technical Staffing hires employees temporarily and only retains the good workers as regular, permanent employees. EX 5 at 14. However, the work conditioning program found that Claimant works slowly. CX 8 at 127; EX 4 at 5. I find that, even if Claimant were able to get hired for any of these positions, it is unlikely that he would be retained after it became evident that he lacks the skills and speed to meet productivity requirements. I concur with Ms. Reid's

opinion that Claimant "might be hired for one of these positions, but not maintain the employment when his actual work performance and abilities have been evaluated by the employer." TR at 104. Thus, because these positions would not last for any significant period of time, they do not satisfy Employer's burden of demonstrating the availability of suitable alternative employment.

v. Claimant's age

Lastly, even if prospective employers were willing to overlook some of Claimant's other shortcomings, his age is still a significant limitation on his competitiveness**.** At the time of the hearing and the 2005 labor market survey, Claimant was 61 years old. As Ms. Reid testified, most employers are unlikely to hire him because they would view him as a short-term employee who will retire soon. TR at 67. Moreover, at least one of the employers was explicitly seeking long-term employees. The job description for the Ice Cream Maker/Dishwasher position through Personnel Management Systems stated that, while no experience was necessary and they were "happy to train the right person," the "[a]pplicants for this position should …be looking for long-term employment." EX 5 at 23. Moreover, Ms. Reid testified that many employers are more willing to hire unskilled workers if they are young, because they can at least do heavy labor and can learn over a long period of employment. TR at 67. I also find this to be a very credible assessment of the impact that Claimant's age has on his competitiveness.

In conclusion, I find that, for a combination of reasons, each position identified by Employer is inappropriate because Claimant would not be able to obtain or perform the work due to his physical restrictions, education, language skills, experience, or skills/abilities combined with his age. Some of the positions identified by Employer are absolutely inappropriate because they violate his work restrictions or they require education, language skills, or experience/abilities that he does not have. The rest of the positions identified by Employer are positions for which Claimant would not be realistically competitive due to a combination of factors. Hypothetically speaking, a prospective employer might be willing to overlook one or two of Claimant's problems, such as his work restrictions, his weak language skills, his limited education, his narrow work experience, his restricted skills and abilities, or his age. However, in real life, an employer would consider Claimant as a whole person with all of his problems combined, and he would not be a competitive candidate for employment. Therefore, for all of the reasons discussed above, Employer did not meet its burden to demonstrate the availability of suitable alternative employment, and the presumption of total disability has not been rebutted.

Because Employer has not demonstrated that suitable alternative employment was available, Claimant is not required to demonstrate that he has diligently sought employment. *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985). Consequently, the evidence presented by Employer that Claimant allegedly failed to apply for any of the positions identified by Employer or conduct any other significant employment search is irrelevant.

b. Degrees and Periods of Disability

Employer's counsel stated at hearing that Employer would stipulate to Claimant's

disability status during the various periods for which Employer already paid Claimant compensation. TR at 25-26. Employer paid Claimant temporary total disability compensation from May 4, 2000 to July 4, 2000, and from August 24, 2000 to May 30, 2001. CX 2 at 3a; EX 2 at 2. During the intervening periods (from March 28, 2000 to May 3, 2000, and from July 5, 2000 to August 23, 2000), Claimant was working for Employer at his regular job and his regular rate of pay (and was therefore not disabled under the Act). CX 3; CX 10. Therefore, pursuant to Employer's stipulation at the hearing, Claimant's disability status is undisputed through May 30, 2001.

Because Employer failed to meet its burden of establishing the availability of suitable alternative employment, the presumption of total disability has not been rebutted. Thus, except for those periods when Claimant was working for Employer and was, at most, partially disabled, I find that Claimant has been totally disabled since the date of injury. Accordingly, Claimant's periods of disability are as follows:

March 28, 2000 – May 3, 2000	No disability (Claimant working for Employer)
May 4, 2000 – July 4, 2000	Temporary total disability (Employer paid compensation at rate of $226.01)
July 5, 2000 – Aug. 23, 2000	No disability (Claimant working for Employer)
Aug. 24, 2000 – May 30, 2001	Temporary total disability (Employer paid compensation at rate of $226.01)
May 31, 2001 – Dec. 5, 2001	No disability (Claimant was working for Employer and paid his regular rate)
Dec. 6, 2001 – Aug. 11, 2002	Permanent status, but no disability (Claimant was working for Employer at his regular rate)
Aug. 12, 2002 – Dec. 29, 2002	Permanent total disability
Dec. 30, 2002 – Jan. 31, 2003	No disability (Claimant was working for Employer at his regular rate)
Feb. 1, 2003 – April 26, 2004	Permanent total disability
April 27, 2004 – June 18, 2004	No disability (Claimant was working for Employer at his regular rate)
June 19, 2004 – present and continuing	Permanent total disability

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2. *Claimant's Average Weekly Wage*

The parties agree that Claimant's average weekly wage should be calculated under section 10(c). TR at 24; ALJX 4 at 4; ALJX 5 at 14.

Section 10(c) may be applied when it would be unreasonable or unfair to calculate the claimant's AWW under sections 10(a) or 10(b). 33 U.S.C. § 910(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998). Here, section 10(a) cannot be applied because the evidence indicates that Claimant worked less than a substantial part, or 75%, of the working days in the year preceding his injury. *See Matulic*, 154 F.3d at 1057-58. Section 10(b) also cannot be applied because there is no evidence regarding the wages of other employees. Thus, section 10(c) must be applied, as is typical in situations like this one where the claimant's work is intermittent or discontinuous. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).

Section 10(c) requires the ALJ to determine a sum that "shall reasonably represent the annual earning capacity" of the claimant at the time of injury. 33 U.S.C. § 910(c). That figure is then divided by 52, as required by section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990). In determining the claimant's annual earning capacity, the express language of section 10(c) provides that the ALJ may consider 1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury, 2) the previous earnings of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or 3) other employment of such employee, including the reasonable value of the services, if engaged in self-employment. 33 U.S.C. 910(c); *Palacios v. Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980); *National Steel Shipbuilding v. Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979).

In this case, Employer argues that Claimant's AWW should be based on his actual earnings in the 52 weeks before his March 28, 2000 injury. Employer asserts that Claimant's wages during that time period were $17,629.04, for an average weekly wage of $339.02. ALJX 4 at 4. (This is the rate at which Employer has paid Claimant temporary disability compensation. EX 2 at 2; CX 2 at 3(a).) Employer concedes that where a claimant's actual earnings do not reasonably represent his earning capacity due to the unavailability of work during that time, the judge may make up for the loss of earnings if it is clear that more work would be available in the future. However, Employer asserts that because there is no evidence that more work would be available to Claimant in future years, his actual earnings accurately reflect the work environment and his earning capacity. ALJX 4 at 5.

On the other hand, Claimant argues that his average weekly wage should be calculated based on an average of his annual earnings over his entire employment history with Employer. ALJX 5 at 14. Claimant states that he "worked for [Employer] Marco Shipyards for 3 years and during these three years made an average of $23,739.49 for an average weekly wage of $456.53…." ALJX 5 at 14. In the alternative, Claimant asserts that the most accurate calculation of Claimant's average weekly wage includes his earnings from working for Fishing Vessel Owners Marine Ways in 1997, yielding an average yearly wage of $24,126.16 and an

average weekly wage of $463.67. ALJX 5 at 14-15. Claimant also argues that Employer has not provided evidence to support its calculation that Claimant's actual earnings in the 52 weeks before the injury were $17,629.04, for an average weekly wage of $339.02. ALJX 5 at 15.

However, neither of the approaches advocated by the parties is appropriate for calculating Claimant's average weekly wage in this case for the following three reasons.

First, Employer is incorrect in using Claimant's actual earnings from the 52 weeks prior to his injury because they are not representative of his earning capacity prior to the injury. While the actual wages earned by the claimant at the time of injury should not be completely disregarded, they are not controlling. *Hall v. Consolidated Equipment Services*, 139 F.3d 1025 (5th Cir. 1998); *Palacios*, 633 F.2d at 843 (citing *Bonner*, 600 F.2d at 1292). Where the claimant has earned less in the year prior to the injury due to the unavailability of work, actual earnings in the year prior to claimant's injury may not reasonably represent a claimant's wage-earning capacity. *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990); *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 464 (1981); *Cummins v. Todd Shipyard Corp.*, 12 BRBS 283, 286 (1981). A judge may make up for the loss of earnings in the year prior to the injury where it is clear that more work would be available in the future. *Lozupone*, 14 BRBS at 464; *Pruner v. Ferma Corp.*, 11 BRBS 201, 208 (1979).

Here, there is justification for looking beyond the 52 weeks prior to the injury because the year prior to Claimant's March 28, 2000 injury appears to have been a particularly slow, and thus, is not representative of his earning capacity. The records (CX 3; CX 10) show that Claimant worked fewer weeks (about 23 weeks) during those 52 weeks than during the two years before (calendar years 1998 and 1999) and after (calendar years 2001 and 2002) the injury. Thus, because Claimant earned less in the 52 weeks prior to the injury due to the unavailability of work and the evidence shows that more work was available after his injury, it is appropriate to make up for his loss of earnings in the year prior to the injury. Thus, I reject Employer's argument that Claimant's average weekly wage should be based on his wages in the 52 weeks before the injury. In doing so, I note that, given Employer's emphasis that Claimant's work was intermittent and subject to slow periods and layoffs, it is it is disingenuous to argue that the wages from a slow period are representative of his overall earning capacity. In addition, I find that Employer has not provided any calculations or pointed to any evidence that support its calculation that Claimant's earnings were $17,629.04.

Second, Claimant's calculation is based on an average of his earnings from 1997, 1998, and 1999. His calculation does not include any of his earnings from 2000, which means that his calculation does not include his earnings from the three months immediately prior to his injury. A computation of annual wage under section 10(c) may be based on a claimant's earning capacity over a period of years prior to the injury. *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976). However, all the earnings of all the years within that period must be taken into account. *Gatlin*, 936 F.2d at 823 (5th Cir. 1991); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). It is improper to selectively choose or exclude earnings from certain years within the time period. Thus, I reject Claimant's calculation based on his earnings in 1997, 1998, and 1999 because it does not include earnings from the year 2000, which is part of the relevant time period.

Third, Claimant is incorrect in averaging his earnings from the three years prior to his injury because such a calculation fails to account for increases in his wage rate over that time period. A section 10(c) computation should reflect a pay raise received shortly before the injury. *Mijangos v. Avondale Shipyards*, 19 BRBS 15 (1986) (claimant had a history of yearly pay raises); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175, 177 (1986) (claimant received a raise five weeks before his death). Thus, the Board has held that it is improper to average a claimant's earnings over recent years because such a computation does not account for wage increases prior to the injury. *Lozupone*, 14 BRBS at 465. To properly account for such increases, a claimant's earning capacity may be calculated by multiplying the claimant's wage rate at the time of injury by a variable which reasonably represents the number of hours of work normally available to claimant. *Id.*; *Cummins*, 12 BRBS at 287; *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979). Here, the Claimant's wages increased on a regular basis, so it is improper to simply average his earnings from 1997, 1998, and 1999. His average weekly wage should represent his earning capacity at the time of injury, which should include his wage rate at that time.

Thus, Claimant's AWW should be calculated based on his wage rate at the time of injury multiplied by a time variable reasonably representing the amount of work that was normally available to him. Claimant's wage rate at the time of injury was $17.75 per hour. To determine a time variable that reasonably represents the amount of work that would normally be available to Claimant in a year, I find it appropriate to look at how many hours Claimant worked over a broad time period that includes both slow and busy years. Accordingly, I begin by calculating that Claimant worked approximately 1126, 1185, 575, 1069, and 1175, respectively, the years 1998, 1999, 2000, 2001, and 2002. CX 3; CX 10. These numbers result in an average of 1026 hours worked per year.

I find it appropriate, however, to increase the average hours worked to account for the fact that the record only includes hours worked for part of 1998, suggesting that the total number of hours worked for that year was significantly greater.[3] I also find it appropriate to increase the average number of hours worked to compensate for the fact that Claimant occasionally worked overtime, for which he was paid one-and-a-half times his regular wage rate. In arriving at the appropriate time variable, I also note that an administrative law judge "has considerable discretion in determining the disabled employee's average annual earnings" under section section 10(c), as long as the decision is generally supported by substantial evidence. *Matthews*, 11 BRBS at 513 (citing *Parks v. John T. Clark & Son of Maryland, Inc.*, 9 BRBS 462). I also note that, in calculating a claimant's earning capacity, some inaccuracy and overcompensation are accepted in order to allow room for flexibility and resolution of doubts in favor of the worker under the Act. *See Matulic*, 154 F.3d at 1057. Based on all of the above, I find that 1150 hours per year is the time variable that most reasonably represents the amount of work that would normally be available to Claimant in a year.

Thus, based on a wage rate of $17.75 per hour and a time variable of 1150 hours per year,

[3] Pages 7 through 15 of CX 3 show that, between June and December 1998, Claimant worked approximately 1126 hours and had earnings of approximately $19,278.89, according to my calculations. However, page 6 of CX 3 states that Claimant earned $26,801.46. Thus, it appears that Claimant worked more months/hours in 1998 than are included in pages 7-15 of CX 3, providing further support for increasing the average number of hours per year.

I find that Claimant's annual earning capacity at the time of injury was $20,412.50. This amount is divided by 52 weeks, pursuant to section 10(d), to yield an average weekly wage of $392.55. Claimant's average weekly wage is then divided by 2/3rds to yield a compensation rate of $261.70.

3. *Claimant's outstanding medical bills*

Section 7(a) of the Act provides in relevant part that the "Employer shall furnish medical, surgical, and other attendance or treatment…for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for medical expenses to be assessed against an employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Serv.*, 13 BRBS 1130, 1138 (1981). Claimant carries the burden to establish the necessity of such treatment rendered for his work-related injury. *See generally Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc.*, 21 BRBS 33 (1988). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Interest should be awarded on all past-due medical benefits, whether owed to the claimant or the claimant's medical providers. *Hunt v. Director, OWCP*, 999 F.2d 419 (9th Cir. 1993); *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997).

Here, Claimant asserts that he has $3,524.00 in outstanding medical bills related to his claim. ALJX 5 at 15. Specifically, Claimant asserts that $249.00 is owed to Community Health Services of Snohomish for services performed between June and September 2005, and $3,275 is owed to Everett Bone & Joint Center for services performed in October 2000 and September 2003. CX 6 at 105; TR at 37, 52. In addition, Claimant asserts that he incurred $29.50 in out-of-pocket costs for a prescription for pain medication, for which he seeks to be reimbursed. CX 6 at 113-14; TR at 49-50. Claimant also asserts that he has paid in full medical bills in the amount of $4,756.00 to Healthsouth and in an unspecified amount to Rex Physical Therapy. CX 6 at 115. While these charges from Healthsouth are reasonable in relation to Claimant's work-related injury, it is very unclear who paid these bills or whether anything is really owed as there are credits noted after the charges. CX 6 at 116-19.

Employer does not dispute that the medical care received by Claimant for his work injury was reasonable and necessary. TR at 36. However, Employer asserts that Claimant has no outstanding medical bills. ALJX 4 at 13. Employer states that "a review of the bill provided either show a zero balance (CX.6, pp. 110, 117, 119) or is unclear as to what is owed or the treatment Claimant received." ALJX 4 at 13. Employer also submitted an affidavit stating that Employer's counsel had obtained information from the Everett Bone & Joint Center that Claimant has no outstanding balance and his account has been closed. ALJX 4 at 13; Eversole Aff. at 2. Claimant argues in his closing brief (ALJX 5 at 15) that this declaration should not be admissible and/or he should get to submit his own declaration on this issue.

I find that Claimant has demonstrated the reasonableness and necessity of his medical treatment related to the work injury. Thus, to the extent there are outstanding bills for medical treatment related to his work injury, Employer must pay those medical providers. Likewise, to the extent Claimant has incurred expenses for his medical treatment related to his work injury, Employer must reimburse Claimant.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant temporary total disability compensation at a rate of $261.70 per week from May 4, 2000 to July 4, 2000; and from August 24, 2000 to May 30, 2001.

2. Employer shall pay Claimant permanent total disability compensation at a rate of $261.70 per week from August 12, 2002 to December 29, 2002; February 1, 2003 to April 26, 2004; and from June 19, 2004 to September 30, 2004.

3. Employer shall pay Claimant permanent total disability compensation at the minimum compensation rate of $261.79 per week from October 1, 2004 to September 30, 2005

4. Employer shall pay Claimant permanent total disability compensation at the minimum compensation rate of $268.41 per week from October 1, 2005 to the present and continuing.

5. Employer shall pay Claimant or Claimant's medical provider, if unpaid, his reasonable medical expenses incurred with respect to his work-related right shoulder condition from March 28, 2000 to the present and continuing, as the nature of Claimant's work-related disability required and as described in the decision above.

6. Employer is entitled to a credit for all disability payments and medical expenses previously paid to Claimant in relation to his March 28, 2000 right shoulder injury.

7. Interest shall be paid on all accrued benefits, at the treasury-bill rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP, computed from the date each payment was originally due to be paid.

8. The District Director shall make all calculations necessary to carry out this Order.

9. Counsel for Claimant shall, within 20 days after this Order becomes final, submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge if Claimant has gained any monetary benefit from this Decision and Order such that Claimant be deemed the prevailing party, if

any. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California